

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

ADVOCATES FOR RESPONSIBLE  
DEVELOPMENT and JOHN DIEHL,

Petitioners,

v.

MARK and KIM MAREE JOHANNESSEN  
and MASON COUNTY,

Respondents.

SHB NO. 05-014

ORDER GRANTING DEFAULT  
AND DISMISSING APPEAL

This matter comes before the Shorelines Hearings Board (Board) on a motion for default and dismissal made orally by Respondents Mark and Kim Maree Johannessen (Johannessens). Attorneys Roger A. Pearce and Catherine A. Drews represent the Johannessens. Mr. Diehl represents Petitioners Advocates for Responsible Development (ARD) and John Diehl (Diehl). Deputy Prosecuting Attorney T.J. Martin represents Mason County.

The Board considering the default motion was comprised of Bill Clarke, Chair, and Mary Alyce Burleigh<sup>1</sup>. The third Board Member, Kevin Ranker, did not participate in the decision on the default motion. Administrative Appeals Judge, Kay M. Brown, presided for the Board.

In ruling on the motions, the Board considered the following material:

1. Petition for Review;

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<sup>1</sup> A panel of three board members is hearing this appeal. *See* RCW 90.58.185.

2. Johannessens' Letter Memorandum in Support of Motion for Default dated September 2, 2005, with attachments;
3. Diehl's Response to Motion for Dismissal or Default;
4. Declaration of John Diehl with attachments;
5. Johannessens' Reply on Motion to Vacate or Dismiss;
6. Letter from T.J. Martin to the presiding officer dated September 7, 2005; and,
7. Declaration of T.J. Martin dated September 12, 2005.

Based upon the records and files in the case, and the evidence and arguments submitted by the parties, the Board enters the following decision.

#### FACTS

On May 4, 2005, Mason County issued a final decision granting a shoreline substantial development permit (SSDP) to Kim Marie Johannessen. The approved proposal was for installation of a rock bulkhead on a vacant lot owned by Ms. Johannessen. ARD and John Diehl filed a petition for review of the approved SSDP at the Shoreline Hearings Board on May 31, 2005.

A pre-hearing conference was conducted by telephone on June 30, 2005. Mr. Diehl participated in the conference both on behalf of himself, and also as a representative of ARD. Following the conference, the presiding officer issued a pre-hearing order establishing a schedule for the appeal, including a hearing date of September 1, 2005.

Consistent with the established case schedule, the Johannessens filed a motion for partial summary judgment, which was timely responded to by Mr. Diehl. The Board issued an order on

1 summary judgment, partially granting and partially denying summary judgment to the  
2 Johannessens, on August 10, 2005.

3 On August 24, 2005, the presiding officer conducted a second telephone conference. Mr.  
4 Diehl participated in the conference on behalf of himself and ARD. The purpose of the second  
5 conference was to discuss the number of witnesses that were identified by the parties in their  
6 final witness lists, and to ensure that the hearing could be completed in the allotted time.

7 On September 1, 2005, the day of the hearing, the Lacey City Police arrested Mr. Diehl in  
8 the parking lot of the Board's office. The Lacey Police were acting upon an outstanding warrant  
9 for Mr. Diehl's arrest issued by the State of California. Mr. Diehl left the lot in the custody of  
10 the Lacey Police Department. No other member of ARD was present at the scheduled time for  
11 the hearing. At the hearing, the Johannessens and the County moved the Board for an Order  
12 finding Mr. Diehl and ARD in default for their failure to attend the hearing, and dismissing their  
13 appeal. In support of their motion, counsel for Johannessens indicated that the Johannessens had  
14 gone to considerable expense in preparation for the hearing, and that the Johannessens and their  
15 expert witness were present and prepared to respond to evidence put forth by the petitioners.

16 The Board took the matter of the motion for default and dismissal under advisement and  
17 adjourned the proceedings. On September 2, 2005, the Johannessens filed a written  
18 memorandum in support of their oral motion for default and dismissal. On September 6, 2005,  
19 Mr. Diehl filed a response. On September 7, 2005, the Johannessens filed a reply.

20 On September 9, 2005, the Board requested additional information from the Mason  
21 County Deputy Prosecuting Attorneys on their knowledge regarding the timing of the arrest of

1 Mr. Diehl. On September 12, 2005, T.J. Martin filed a letter and declaration. In the declaration,  
2 Mr. Martin indicated that prior to the morning of September 1, 2005, he was aware that the State  
3 of California had issued a warrant for Diehl's arrest, but he was not aware that Mr. Diehl was  
4 going to be taken into custody on September 1, 2005.

#### 5 ANALYSIS

6 RCW 34.05.440(2) provides that if a party fails to attend a hearing, the presiding officer  
7 may serve upon all parties a default or other dispositive order. RCW 34.05.440(3) further  
8 provides that the party against whom the order was entered may file a written motion requesting  
9 that the order be vacated and stating the grounds relied upon, within seven (7) days after the  
10 order is served. The Shorelines Hearings Board rule, WAC 461-08-485(1) specifies the same  
11 process. Based on RCW 34.05.440 and WAC 461-08-485(1), a party's failure to appear at a  
12 scheduled hearing constitutes grounds for the entry of a default order.

13 The Washington Court has recently provided the following guidance in evaluating  
14 motions for default:

15 We review a trial court's ruling on a motion to vacate a default judgment for an abuse of  
16 discretion. . . . Our primary concern is that a trial court's decision on a motion to vacate a  
17 default judgment is just and equitable. The trial court must balance the requirement that  
18 each party follow procedural rules with a party's interest in a trial on the merits.  
19 Consequently, we evaluate the trial court's decision by considering the unique facts and  
20 circumstances of the case before us.

21 *Showalter v. Wild Oats*, 124 Wn. App. 506, 510-511, 101 P.3d 867, 869 (2004)(citations  
deleted).

The situation presented here is a difficult one. Mr. Diehl clearly intended to appear and  
present his case to the Board. He was prevented from doing so by his apprehension in the

1 parking lot in front of the Board's office. The precise timing of Mr. Diehl's arrest was not Mr.  
2 Diehl's fault, nor was it under his control. However, Mr. Diehl could have prevented the arrest  
3 from happening at all if he had appropriately addressed his legal problems with the State of  
4 California prior to the date of the hearing.

5 Both respondents have been prejudiced by Mr. Diehl's failure to be able to proceed to  
6 hearing on September 1. Mason County was present with one witness and its attorney, and was  
7 ready to proceed on the morning of the hearing. The Johannessens were also present and ready  
8 to proceed, with several witnesses, an expert from Portland, and their attorney from Seattle. To  
9 require the respondents to incur the expense of being ready to go to hearing again, because of  
10 Mr. Diehl's failure to address his legal problems in California, does not seem just and equitable.

11 Mr. Diehl argues that Mason County had him arrested to prevent him from presenting his  
12 case before the Board. The fact of the matter is that it was Mr. Diehl's own actions that created  
13 the situation where a warrant was issued for his arrest. Further, there is no evidence in the record  
14 that Mason County deliberately manipulated the timing so that Mr. Diehl couldn't proceed to  
15 hearing. Mason County certainly cooperated with Lacey City Police, providing them  
16 information about Mr. Diehl's likely whereabouts on September 1, 2005. However, as T.J.  
17 Martin points out in his letter of September 7, 2005, he could do no less as a member of the  
18 Mason County Prosecutor's Office, an Officer of the Court and an attorney. Mr. Martin's  
19 declaration indicates that he was not aware prior to September 1, 2005, that Mr. Diehl was going  
20 to be placed into custody the morning of the hearing. It was the Lacey Police Department that  
21 made the decision to arrest Mr. Diehl that morning.

1 On balance, the Board concludes that entry of a default order is justified. Because the  
2 Petitioners have the burden of proof in this appeal, and they failed to appear and present any  
3 evidence, Respondents are entitled to dismissal of this appeal. WAC 461-08-500(3).

4 ORDER

- 5 1. The Respondents' motion for default is granted, and this appeal is dismissed.
- 6 2. The Petitioners may file a written motion requesting that this order be vacated, and  
7 stating the grounds relied upon for that request. The Board must receive this written  
8 explanation within seven days<sup>2</sup> after the date of mailing of this order.
- 9 3. The address for the Shorelines Hearings Board is:

10 Environmental Hearings Office  
11 4224-6<sup>th</sup> Avenue SE  
12 Bldg. 2, Rowe 6  
13 P.O. Box 40903  
14 Lacey, WA 98504-0903  
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20 <sup>2</sup> Although counsel for the respondents indicated that they would be willing to allow the petitioners 14 days to  
21 respond, RCW 34.05.440 specifies that the time for response is seven days unless a longer period is specified by  
board rule. The SHB rule provides the same seven-day period. See WAC 461-08-485. Therefore, counsels' request  
to allow 14 days for response is denied.

1 SO ORDERED this 21<sup>st</sup> day of September 2005.

2  
3 **SHORELINES HEARINGS BOARD**

4 Bill Clarke, Chair

5 Mary Alyce Burleigh, Member

6 Kay M. Brown  
7 Administrative Appeals Judge